UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Petitioners,	)	
v.	)	**MEMORANDUM IN RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER AND IN SUPPORT OF MOTION TO DISMISS**
Respondents.	)	

Both the petition and motion from temporary restraining order ("TRO") are misguided. Despite her protestations to the contrary, petitioner ("petitioner") is not entitled to derivative citizenship, based on the naturalization of her mother, because she does not meet the requirements of the Child Citizenship Act ("CCA"), 8 U.S.C. § 1431(a) (2000). Moreover, petitioner has not met her burden of proof to show that she fulfilled the statutory and regulatory requirements to receive a passport or a Social Security card, so as to allow the Court to grant relief under 8 U.S.C. § 1503(a). Thus, petitioner's request for preliminary relief must be denied, and respondents' motion to dismiss should be granted.

DISCUSSION

Tellingly, petitioner admits that she has not complied with all necessary prerequisites for derivative citizenship

under the CCA. In her petition, she takes "the position that even though the Form I-551 requirement is lacking, it is congress' intent that a person in [petitioner's] situation should be granted a passport."[1] Petition for Writ of Mandamus, Declaratory Judgment, and Injunctive Relief ("Petition"), Count One, at p. 8. See id. at p. 2, ¶ 3 (indicating that petitioners provided passport agency with documentary evidence "except that they cannot present a Form I-551"). Her position seems to be that, if she had legal status at the time she entered the United States (here, with a B-2 visa as a visitor for pleasure), she is entitled to citizenship. Congress has, however, established a different requirement. An alien petitioner must have legal permanent residence ("LPR") status in order to qualify for derivative citizenship under the CCA. See 8 U.S.C. § 1431(a).

Congress has the exclusive power to establish the requirements for naturalization, see U.S. Const., Art. I, § 8, Cl. 4, and the Secretary of State has sole authority to establish rules for passport issuance, see 22 U.S.C. § 211a et seq.; Executive Order 11295 (August 5, 1966), F.R. 10603, --

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[1] The "Form I-551 requirement" references an alien's status as a lawful permanent resident. A Form I-551 is a permanent resident card, commonly called a green card.

requirements which petitioner clearly fails to meet. Courts may not use their equitable powers to confer citizenship or other benefits in violation of those requirements. See INS v. Pangilinan, 486 U.S. 875, 882-84 (1988). Petitioner is not entitled to the preliminary relief she seeks and fails to state claims on which relief may be granted. Accordingly, the petition should be dismissed.

A. FACTS

According to the petition and exhibits, petitioner, a native and citizen of Kenya, entered the United States on July 26, 2001, on a B-2 non-immigrant visa for pleasure, with an extended authorized period of stay ending on January 25, 2003. See Petition at Exhibits 4 and 6. In December, 2002, she filed a Form I-539, seeking to extend her non-immigrant stay. Before the Form I-539 was adjudicated, petitioner's mother, , filed a Form I-130, petition for alien relative, seeking to extend petitioner's stay until could sponsor petitioner, her daughter, as a naturalized U.S. citizen. Petition Exhibits 4 and 5. With the filing of the I-130, petitioner's status changed from a B-2 visitor for pleasure (or overstay) to an alien who intended to stay permanently in the United States, known as an

"intending immigrant." Id. As an intending immigrant, petitioner was not entitled to a further extension of her visitor's visa; she is currently out of status. See id.

became a naturalized citizen in February, 2008. Petition Exhibit 1. Petitioner now seeks a declaration that she has derivative citizenship through her mother and an order requiring that she be issued both a passport and a Social Security card.

Petitioner recently applied for a passport from the United States Department of State. On February 22, March 12, and March 24, 2008, the State Department requested that petitioner submit further information, including a certificate of citizenship or other proof of citizenship, so that her application could be processed. Petition Exhibit 6. Petitioner fails to allege that she provided such information, nor could she as she does not possess the kinds of documents necessary to show citizenship and thus her eligibility for a passport.[2] Similarly, on June 11, 2008, petitioner applied

[2] To date, there has been no grant or denial of the passport application and petitioner alleges none. The last request from the State Department granted petitioner 90 days from March 24, 2008, to provide the requested documentation or her application will be denied. The time period ends on or about June 23, 2008.

for a Social Security card. See Petition Exhibit 11, filed June 12, 2008. Petitioner was informed that a card could not be issued to her until she provided documents necessary to show that she has LPR status (Form I-551) or is a citizen. She was invited to present the required documentation but has not done so. Id. See 20 C.F.R. § 422.107(f)(setting forth the requirements for the issuance of a Social Security card).

To date, neither the State Department nor the Social Security Administration has been supplied the requested documents necessary to establish petitioner's eligibility for a passport or a Social Security card, respectively.

B. STATUTORY FRAMEWORK

There are two statutes at issue here. One is the Child Citizenship Act, 8 U.S.C. § 1431(a), under which petitioner claims derivative citizenship. The second is § 360 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1503(a), which provides jurisdiction for a lawsuit when United States nationals are denied rights and privileges by departments or agencies of the United States, if other statutory conditions are met. Neither of these statutes support petitioner's request for relief.

1. CHILD CITIZENSHIP ACT OF 2000, 8 U.S.C. § 1431(a)

Title 8, United States Code, § 1431(a) provides that:

> A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:
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> (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
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> (2) The child is under the age of eighteen years.
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> (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

The Child Citizenship Act ("CCA") grants automatic citizenship to children born outside this country when all the statutory requirements are fulfilled. Bitterman v. Ashcroft, 106 Fed.Appx. 699, 2004 WL 1790035 (10th Cir., August 11, 2004). To qualify for such derivative citizenship, a child, born abroad to a later-naturalized parent, must be a lawful permanent resident ("LPR") alien, under 18 years old, and "residing in the United States in the legal and physical custody of a citizen parent" (or in the custody of a parent at the time the parent becomes naturalized). See Bagot v. Ashcroft, 398 F.3d 252 (3rd Cir. 2005)(decided under 8 U.S.C.

§ 1432(a) (1999). All three statutory conditions must be met for an alien to acquire citizenship derivatively. See Gomez-Diaz v. Ashcroft, 324 F.3d 913, 915 (7th Cir. 2003).

As more fully discussed below, petitioner does not qualify for citizenship under the CCA because she fails to meet the requirement that she be a lawful permanent resident alien. Instead, petitioner entered the United States in July, 2001, as a non-immigrant visitor for pleasure with authorization to stay until January, 2003. Petitioner's Exhibit 4. Because petitioner is not in LPR status, she is not entitled to derivative citizenship under the CCA.

2. § 360 of the INA, 8 U.S.C. § 1503(a)

Section 1503(a) provides in pertinent part that:

> If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or officer thereof, on the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28....

Central to a claim under § 1503(a) is a showing that a department or agency of the United States, or an official thereof, has denied a citizen rights or privileges on the ground that she is not a United States citizen. Said v. Eddy,

87 F.Supp.2d 937, 940 (D. Alaska, 2000). Without evidence of citizenship or a denial of rights or privileges of citizenship, there is no basis for a declaratory action under § 1503(a). Id. and cases cited therein. Section 1503(a) does not create an avenue to citizenship for an alien who does not meet the requirements for citizenship.

As set forth below in the context of success on the merits, petitioner cannot make the showing necessary for declaratory relief under § 1503(a).[3] Instead, the petition should be dismissed for failure to state a claim on which relief may be granted. Even when final agency action is taken on the ground that petitioner failed to provide the documentation requested by the State Department and by the Social Security Administration, petitioner will remain unable to state a claim for relief, as she is unable to establish the legal predicate for her passport claim (citizenship) or her Social Security card claim (LPR status or citizenship).

C. STANDARD FOR PRELIMINARY RELIEF

The primary function of preliminary relief is the maintenance of the *status quo* until a time a court can grant

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[3] Likewise, jurisdiction does not lie under § 1503 or under any other jurisdictional basis alleged by petitioner, including mandamus under 28 U.S.C. § 1361.

effective relief. Ferry-Morse Seed Co. V. Food Corn, Inc., 729 F.2d 589, 593 (8th Cir. 1984). Here, however, petitioner seeks more than preservation of the *status quo;* she seeks full mandatory relief, including the immediate issuance of a passport and Social Security card. See Motion for Temporary Restraining Order at p. 2. To achieve such relief, petitioner has a high burden of proof: she must clearly establish her right to relief. Id., citing 11 Wright & Miller, *Federal Practice and Procedure* § 2942. Moreover, it is only when the exigencies of the circumstances demand mandatory relief that this otherwise sparingly used remedy be granted. Id.

The general standard for preliminary injunction in this Circuit is set out in Dataphase Sys., Inc. V. C.L. Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981). In determining whether preliminary relief should be granted, a court looks at (1) the threat of irreparable harm to the moving party, (2) the balance of the harm to the moving party and the injury to the non-moving party if an injunction is granted, (3) the probability of success on the merits, and (4) the public interest. Id. The "question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are

determined." Id. at 113.

Here, petitioner fails to show that it is probable that she will succeed on the merits of her claims, that she will suffer irreparable harm, or that the public interest weighs in her favor. Accordingly, her request for a TRO should be denied.

1. Petitioner is unlikely to succeed on the merits

Rather than come forward with evidence that she has fulfilled the elements for derivative citizenship under the CCA, petitioner attempts an "end run" around the statutory requirements and seeks a declaration under § 1503(a) that she has been denied the rights and privileges of citizenship. She tries to sidestep the CCA, ignoring repeated requests for evidence of citizenship so that her passport application could be processed. Without showing that she meets the CCA requirements, including LPR status, or that she otherwise complies with the statutes and regulations that bind all citizens applying for passports or Social Security numbers, petitioner simply cannot show that it is likely she will succeed on the merits.

a. Petitioner does not comply with the CCA

Because petitioner was not born in the United States and

has never been naturalized before a court, she claims automatic citizenship through the CCA. The burden of proof of eligibility for citizenship falls on petitioner; any doubts about her eligibility must be resolved against her and in favor of the United States. See Bagot, 398 F.3d at 257-58; 22 C.F.R. § 51.40 and 51.41.

Citizenship and naturalization are governed by the Constitution and federal statute and regulation. Bagot, 398 F.3d at 269. "The Constitution confers on Congress exclusive authority to establish rules of naturalization." Mustanich v. Mukasey, 518 F.3d 1084, 1087 (9th Cir. 2008), citing U.S. Const. Art. I, § 8, cl. 4; Pangilinan, 486 U.S. at 875. The power to confer citizenship "has not been conferred on the federal courts, like mandamus or injunction, as one of their equitable powers." Pangilinan, 486 U.S. at 883-84. While the courts perform specific functions in accordance with the terms established by Congress, they may not use estoppel, equity or other means to confer citizenship in violation of the limitations established by Congress. Id. at 884-85.

Here, Congress plainly requires that an individual born abroad who wishes to employ the CCA to become a citizen must comply with certain requirements. Those requirements cannot

be ignored. Mustanich, 518 F.3d at 1088, citing 8 U.S.C. § 1421(d) ("A person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter and not otherwise."). Although petitioner claims derivative citizenship through her naturalized mother, she fails to present evidence of compliance with the derivative citizenship requirements of 8 U.S.C. § 1431(a) and, accordingly, this Court must reject her petition.

Under § 1431(a), a child under 18 years of age, who has a parent who is a citizen by birth or naturalization and who is a lawful permanent resident of the United States, residing under the legal and physical custody of her citizen parent, is entitled to automatic, derivative citizenship. Id. Petitioner has not, however, alleged or shown compliance with the requirement that she be a lawful permanent resident. In fact, she agrees that she is not. See, e.g., Petition at Count One, p. 8; id. at p.2, § 3. See also Declaration of Rebecca Arsenault-Heirze, dated June 11, 2008 (indicating that, based on review of United States Citizenship and Immigration Services records, petitioner does not possess LPR status). Instead, she is out of status - a visitor for pleasure who

overstayed the term of her visa. When statutory requirements of the CAA are, as here, unmet, there is no governmental wrong to be remedied, and the Court may not employ equity to confer citizenship. Mustanich, 518 F.3d at 1089. See Gomez-Diaz, 324 F.3d at 915 (requiring all three elements of § 1431(a) to be present to confer derivative citizenship).

Petitioner apparently takes the position that § 1431(a) requires only that she was *lawfully admitted* to the United States when she arrived in July, 2001, as a non-immigrant visitor for pleasure, rather than that she have "*lawful admission for permanent residence,*" as required by the CCA. See 8 U.S.C. § 1431(a)(3)(setting forth the requirement that the child reside in the custody of the citizen parent pursuant to a lawful admission for permanent residence). The term "lawful permanent residence" is defined as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20).

Petitioner admits that she lacks permanent resident status. See Petition, Count One, at p. 8; id. at p.2, ¶ 3. The Petition exhibits confirm that she is no longer in legal status as her B-2 visitor for pleasure visa has not been

extended now that she is an intending alien. Petitioner's assertion that legal admission is sufficient to confer citizenship under the CCA is clearly incorrect. She cannot rewrite the statute for Congress and cannot succeed on the merits of her petition. Preliminary relief should be denied, and the petition should be dismissed.

b. Petitioner is not entitled to § 1503 relief

The purpose of § 1503 is to provide a jurisdictional basis for a lawsuit to protect persons whose rights and privileges as U.S. nationals are denied by federal department, agencies or employees. See Harake v. Dulles, 158 F.Supp. 413, 416 (E.D. Mich. 1958). The statute does not, however, create a cause of action for an alien who has not met the requirements of citizenship in the United States. Permitting such an action under § 1503 would allow the alien to evade the statutory procedures for becoming a citizen and would frustrate the orderly legislative scheme. See Rosasco v. Brownell, 163 F.Supp. 45, 53 (E.D. N.Y. 1958).

(1) Petitioner lacks standing and fails to state a claim

In order to succeed on the merits of her § 1503(a) claim, petitioner needs to prove that she was denied the rights or privileges of a national by a government department, agency or

official, on the ground that she is not a national of the United States. See Nelson v. United States, 107 Fed.Appx. 469, 2004 WL 1770564 (6th Cir., August 5, 2004). Petitioner has not, however, established that she has met the requirements for citizenship, either under the CCA or otherwise. Accordingly, she fails to state a claim under § 1503(a) and fails to establish standing. See Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)(noting that the party invoking federal jurisdiction bears burden of establishing standing and setting forth Article III standing requirements).

(2) Petitioner has failed to show final agency action

Section 1503(a) requires final administrative action before a declaratory judgment action can be commenced. Nelson, 2004 WL at 1770564 **1, citing United States v. Breyer, 41 F.3d 884, 891-92 (3rd Cir. 1994). Earlier this year, petitioner filed a passport application which has not yet been adjudicated because she has not complied with repeated requests for proof of citizenship. Petition Exhibit 6. Similarly, on June 12, 2008, petitioner filed Petition Exhibit 11, indicating she was informed, on June 11, 2008, that a Social Security card could not be issued until she

provided immigration documents showing her LPR status (Form I-551) or evidence of citizenship. Other than showing that both the State Department and the Social Security Administration need further information to process her requests, petitioner has provided no proof of final agency action. Absent such proof, the request for § 1503(a) relief fails.

What petitioner argues, instead, is that she should not be required to exhaust administrative remedies because she is a citizen, citing Moussa v. INS, 302 F.3d 823 (8th Cir. 2002). That case is wholly inapplicable to this petition.

In Moussa, the petitioner claimed that he was not subject to removal because he was a naturalized citizen of United States under the requirements of a now-repealed statute. The government asserted that petitioner failed to exhaust his administrative remedies because he failed to raise the issue of his parent's legal separation on appeal to the BIA (after the immigration judge ruled in his favor). The Eighth Circuit found that the exhaustion of administrative remedies required in removal petitions inapplicable for two reasons. First, the statute required exhaustion by an "alien," and the Court had to determine whether the petitioner was an alien to find whether the statutory exhaustion requirements were applicable.

Second, the petitioner was successful before the immigration judge on the nationality issue. It would be incongruous to require that he re-litigate the issue on which he was successful before the BIA.

Moussa is inapplicable to this § 1503(a) claim. Under the statute's specific terms, an administrative denial is required. 8 U.S.C. § 1503(a) (providing relief for one claiming a right or privilege of a national of the United States and who *"is denied such right or privilege"* by a government department, agency of official)(emphasis added). Without a final decision that a petitioner is not a U.S. citizen and without a final administrative denial of a right or privilege of citizenship, there is no basis for jurisdiction or for the declaratory judgment action envisioned by the statute. See Eddy, 87 F. Supp.2d at 937. See also Elizarraraz v. Brownell, 217 F.2d 829, 830-31 (9th Cir, 1954)(stating that absent evidence or stipulation that specific right or privilege denied on ground that petitioner not an a national of United States, no need to decide case on merits).

Although petitioner has presented no evidence that any government employee, agency or department has taken any action

inimical to her to date, the record shows that the 90-day period for petitioner to provide documentation of her eligibility for a passport end on or about June 23, 2008, the day before the hearing on the motion for temporary relief. Thus, while there is now no denial on which to base this Court's jurisdiction, a denial of the passport application may be imminent if petitioner fails to provide the requested proof of citizenship.

As to the passport application, the government also refers the Court to the discussion below regarding mandamus jurisdiction and notes that, even if petitioner's passport application is denied, she is not entitled to relief under § 1503 as she cannot show that she is a citizen and, importantly, mandamus will not lie for passport issuance which is a discretionary function.

As to the issuance of a Social Security card, petitioner has provided no proof that the government has taken any final agency action, let alone deny petitioner a right or privilege. The Social Security Administration has simply asked her for evidence showing that she meets the citizenship or LPR requirements to be issued a Social Security card. Petition Exhibit 11. See Florentine v. Landon, 231 F.2d 452, 454 (9th

Cir. 1955). Accordingly, her request for temporary or declaratory relief under § 1503(a) fails. Her Social Security claims likewise fail for lack of mandamus jurisdiction as discussed below.

(3) Mandamus is inappropriate

The Mandamus Act, 28 U.S.C. § 1361, vests a district court with original jurisdiction over an action in the nature of mandamus to "compel an officer or employee of the United States or an agency thereof to perform a duty owed to the plaintiff." Courts have routinely limited mandamus relief to the clearest and most compelling cases in which a petitioner demonstrates three elements: (1) a clear and indisputable right to the relief sought, (2) a clear duty to act by the government, and (3) no other adequate remedy available at law. See Castillo v. Ridge, 445 F.3d 1057, 1060-61 (8th Cir. 2006). Those elements mean that a writ of mandamus is issued only when the duty to be performed by the government is ministerial, not discretionary, and the obligation to act is clearly defined. The party seeking the writ has the burden to show that the issuance of the writ is clear and indisputable. Petitioner here fails to meet that burden.[4]

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[4] Petitioner also seeks relief under the Administrative Procedures Act, the Declaratory Judgment Act, the All Writs

(a) Passport

A passport "is, in a sense, a letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer." Haig v. Agee, 453 U.S. 280, 292 (1981). It is a travel document showing the bearer's origin, identity, and nationality. 8 U.S.C. §1101(a)(30). During its period of validity, a passport has the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship. 22 U.S.C. § 2705(1). The issuance of a passport is not a mandatory duty owed by the State Department to those who apply. Instead, it is a discretionary function authorized to the Secretary of State. Haig, 453 U.S. at 293. If a duty is discretionary, it is not owed. Perkins v. Elg, 307 U.S. 325 (1939).

The Secretary of State is has exclusive authority by statute to issue passports. 22 U.S.C. § 211a. Congress has, however, placed limitations on who may be issued passports and has long recognized the authority of the Department of State

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Act, and the Due Process Clause of the Fifth Amendment. None of these provide jurisdiction or grounds for the relief sought. No matter how many statutes she cites as grounds for relief, petitioner just cannot sidestep the fact that she does not meet the requirements for derivative citizenship under the CCA as she does not have LPR status.

to withhold issuance. Agee, 453 U.S. at 293.

Passport statutes and regulations require evidence of citizenship. See 22 U.S.C. §§ 212 and 213; 22 C.F.R. § 51.2 and 51.40. Title 22, United States Code, § 212, limits a passport to person "owing allegiance to the United States," and 22 U.S.C. § 213 requires that, before a passport can be issued, an applicant must submit a written application containing true recitals of every fact required by law or regulation. The statutory requirement is more than a mere formality. It is necessary to the exercise of the Secretary of State's discretion.

Because of the legal significance of a passport, an applicant bears the burden of showing that she is entitled to a passport. To meet her burden, an applicant must establish her nationality and identity. See 22 C.F.R. §§ 51.40; 51.23. Here, rather than comply with the repeated requests that petitioner supply such evidence, petitioner is "attempting to sidestep the regulations which are binding on all citizens applying for passports." See Lee v. Dulles, 155 F. Supp. 708, 710 (D. Hawaii, 1957).

In Lee, the plaintiff alleged that he was a native-born citizen of the United States and that, as such, he was

entitled to be issued a passport. The plaintiff made no attempt, however, to submit proof of citizenship as required by the passport regulations, and his application for a passport was disapproved on that ground. The district court found that implicit in § 1503(a) was a requirement that plaintiff be denied a passport *on the ground that he was not a national of the United States*. Since plaintiff failed to make a "sincere or serious effort to comply" with the passport regulation requiring proof of citizenship, he failed to state a claim under that statute. Id.

Like the plaintiff in Lee, petitioner here has made no showing that she is being denied a passport (or a Social Security card) *on the ground that she is not a citizen.* In fact, she has made no real attempt to show entitlement to a passport, according to the record before the Court. She provides no evidence that she has responded to the numerous requests for citizenship proof as required of all citizens requesting a passport. Her attempt to sidestep the passport statutes and regulations by asking the Court to order that a passport be issued without proof of citizenship must be denied. She has not established that her right to the relief sought is so clear and indisputable that mandamus is

appropriate.

Indeed, by petitioner's own admission, as contained in the petition and exhibits, she has established that she is an alien with no right to the relief sought. Any claim here that the government is obligated to grant a passport ignores what statute and regulation require from all those seeking a passport: compliance with applicable statutes and regulations, including those requiring evidence of nationality.

Because petitioner has not established that her right to relief is clear and indisputable or that the government owes her a nondiscretionary duty, her request for mandamus relief must be denied.

(b) Social Security card

Like the statutes and regulations governing passports, the relevant statutory and regulatory authority governing issuance of Social Security cards set forth limitations on entitlement. To be eligible for such a card, an applicant must meet the evidence requirements of 42 U.S.C. § 405(c)(2)(B)(i)(I-III) and 20 C.F.R. § 422.107. Those requirements are evidence of age, of U.S. citizenship or alien status as an LPR (or other status, granted by the Department of Homeland Security, allowing an alien to engage in

employment in the United States), and of identity. When a foreign-born applicant claims U.S. citizenship, she is required to present a certificate of naturalization, a certificate of citizenship, a U.S. passport, a U.S. citizen identification card or other verification from the State Department, Department of Homeland Security or court records confirming citizenship.

Petitioner has none of the documents requested by the Social Security Administration and required before she becomes entitled to a Social Security card. See Petition Exhibit 11. She has not been naturalized, nor has she been granted automatic citizenship under the CCA. By her own admission, she has no LPR status and has not claimed that she has been granted other status so as to allow her to work in the United States. Petition, Count One, at p. 8. She simply does not meet the requirements for issuance of a Social Security number, and her request for preliminary relief must be denied. See 20 C.F.R. § 422.107.

2. Petitioner will not suffer irreparable harm

Petitioner cannot meet this Dataphase element because there are other routes to citizenship. Even is she is not entitled to derivative citizenship under the CCA, she is

eligible for naturalization and can ultimately be naturalized once she receives LPR status as an immediate relative of a United States citizen, her mother, and meets other eligibility requirements. It appears that that process is underway because her mother has recently filed a Form I-130 on behalf of petitioner who is now deemed an "intending immigrant," see Petition Exhibit 4, and petitioner filed a Form I-485 for adjustment of status to lawful permanent resident on June 2, 2008. Arsenault-Heize Declaration. Through that process, if completed and approved, petitioner can gain LPR status and be entitled to a Social Security card and, if she is naturalized in her own right, she can obtain a passport consistent with governing regulations. See 22 C.F.R. part 51. While derivative citizenship may have been the easier route to naturalization, there no irreparable harm here.

Moreover, this is not a case in which petitioner is asking the Court to maintain the *status quo* pending a decision on the merits. Instead, she is now seeking all the mandatory relief to which she claims to be entitled if she succeeded on the merits and successfully established her eligibility under the CCA. She wants citizenship, something this Court simply cannot order under the facts presented.

This case did not need to be an emergency. Petitioner could have been the beneficiary of a petition for LPR status once her mother became an LPR, presumably more than five years before her mother was naturalized. Had a timely application been made for such status, it would not have been necessary to seek relief in the Court.[5] Simply put, this is not the kind of extraordinary circumstance which merits mandatory preliminary relief.

3. The public interest does not favor petitioner

Citizenship is to be conferred in the manner specified by Congress. Pangilinan, 486 U.S. at 882. The requirements of 8 U.S.C. §§ 1431(a) and 1503(a) cannot be ignored. See 8 U.S.C. § 1421(d) (allowing naturalization only in the manner and under conditions prescribed by statute and not otherwise). Indeed, a district court may not avoid the Pangilinan rule or the statutory requirements to allow a result in which the consequence is conferral of citizenship based on equitable grounds. See Mustanich, 518 F.3d at 1089.

The public interest clearly lies in the enforcement of this nation's statutory citizenship requirements. Petitioner

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[5] In Petition Exhibit 4 at p. 2, there is a reference to seeking a deferral on a decision about petitioner's status until could sponsor her as a U.S. citizen.

here is not being asked to do more than any other alien seeking naturalization, or more than any other person seeking a passport or Social Security card. Petitioner's attempts to sidestep statutory provisions and procedures are wholly incompatible with the public interest. As the public interest does not favor petitioner, she fails to establish this Dataphase factor.

D. Motion to Dismiss under Rule 12(b)(6)

Based on the facts and law set forth above, it is clear that petitioner fails to state claims on which relief may be granted as to any of the respondents. With regard to the Seattle Passport Office and its official, David Bauxter, petitioner fails to state a claim upon which relief may be granted within the meaning of Rule 12(b)(6), Fed.R.Civ.P., with regard to her passport application as she fails to meet her burden of showing citizenship. The face of her petition itself demonstrates beyond doubt that she is an alien ineligible for a passport.[6] Accordingly, the petition must be dismissed as to the State Department and its employees.

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[6] It is further ground for dismissal of the petition against the passport official (and Social Security Administration employees) that any lawsuit under § 1503 may be brought only "against the head of such department or independent agency."

With regard to Social Security Public Affairs Specialists Rhonda Whitenack and Jim Szechowicz, plaintiff fails to show that she provided or can provide proof of citizenship, LPR status or any other type of work authorization so as to meet the requirements for issuance of a Social Security card. As such, the petition must be dismissed as to these employees.

Lastly, with regard to Attorney General Michael Mukasey, petitioner makes no specific reference to him or to the Department of Justice (other to identify him in paragraph 15 of the petition) in either the petition or motion for temporary restraining order. The Attorney General no longer has the function of dealing with immigration and naturalization issues. Those functions were transferred to the Department of Homeland Security in 2003. See Homeland Security Act of 2003, Pub.L. No. 107-296 §§ 451(b)(5), 471(a), 116 Stat. 2135, 2196, 2205. See also Taylor v. Barnhart, 399 F.3d 891, 895 n.2 (8th Cir. 2005). Petitioner fails to state a claim against the Attorney General for this additional reason.

CONCLUSION

Petitioner is not entitled to the preliminary relief she seeks because she cannot show that she is likely to succeed on

the merits, that she will suffer irreparable harm, or that the public interest favors her. The request for preliminary relief must, accordingly, be denied. Because petitioner fails to state claims on which relief may be granted as to any respondent and as jurisdiction has not been established, this petition must be dismissed in its entirety.

Dated: June 13, 2008

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